STATE OF MICHIGAN

COURT OF APPEALS

BARRY N. HENDERSON,

Plaintiff-Appellee,

V

WESTWIND TOWNHOMES LIMITED PARTNERSHIP, an assumed name of WESTWIND HOMES,

Defendant-Appellant.

UNPUBLISHED
June 6, 2006

No. 262972
Ingham Circuit Court
LC No. 03-1598-NO

Before: Cavanagh, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

In this premises liability action defendant, Westwind Townhomes Limited Partnership, appeals by leave granted the trial court's order denying its motion for summary disposition. Because questions of material fact exist with respect to whether the ice-covered snow was open and obvious or presented special aspects and whether defendant breached statutorily imposed duties, we affirm.

Plaintiff filed suit seeking recovery of injuries he sustained when he slipped and fell on ice-covered snow located on the sidewalk in front of a townhome he leased from defendant. Plaintiff alleged that defendant negligently failed to maintain the premises in a safe condition as required under the common law, and failed to ensure the premises were fit for their intended purposes, kept in reasonable repair, and kept in a safe and sanitary condition as required by statute, specifically MCL 554.139 and MCL 125.536. Defendant denied liability and moved for summary disposition on grounds that the danger posed by the ice-covered snow was open and obvious and lacked any special aspects that would make it unreasonably dangerous. Defendant also asserted summary disposition would be appropriate because the statutes relied upon by plaintiff could not reasonably be construed to impose a duty upon defendant. The trial court denied defendant's motion for summary disposition, finding that questions of material fact existed with respect to all issues raised by defendant.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). In considering a motion pursuant to MCR 2.116(C)(10), a court considers affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.* If the proffered evidence fails to establish a genuine issue of material fact,

the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Issues concerning the interpretation of a statute are questions of law that we also review de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

On appeal, defendant first argues the trial court improperly denied summary disposition in its favor when the condition complained of by plaintiff was open and obvious. A premises liability claim, like a general negligence claim, requires that a plaintiff prove the following four elements: (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty; (3) causation; and (4) damages. *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999). As a tenant of defendant, plaintiff is regarded as an invitee. *Woodbury v Bruckner (On Remand)*, 248 Mich App 684, 691; 650 NW2d 343 (2001). A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). If a condition is "open and obvious," however, this duty generally does not apply unless the condition poses an unreasonable risk of harm. *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000).

The test for an open and obvious danger is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Abke, supra*. Because the test is objective, the court looks not to whether plaintiff should have known that the condition was hazardous, but to whether a reasonable person in his position would foresee the danger. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002).

In the instant matter, plaintiff testified that he exited through the front door of his townhome at approximately 6:30 p.m. on January 8, 2003 to walk his dog. Plaintiff testified that at the time he left, it was relatively close to darkness, if not dark, and that he had his porch light on. Plaintiff testified that as he stepped from the final landing at the bottom of his porch steps onto the sidewalk, he slid on a patch of ice-covered snow, falling face-first into his garage. According to plaintiff, he was looking down as he descended the steps and was on guard for snow and ice conditions. Plaintiff testified he did not see the condition because it was dark and it was his impression that sidewalk had been cleaned. Plaintiff testified he had noticed earlier in the day that the sidewalks appeared to have been cleaned off.

Given plaintiff's testimony that he was proceeding down the steps cautiously, looking down as he walked, yet was unable to see the condition that caused him to fall, it is questionable whether an average user of ordinary intelligence could have discovered the risk upon casual inspection. The trial court was thus correct in finding that a genuine issue of material fact existed whether the ice-covered snow condition on the sidewalk was open and obvious.[1]

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[1] The recent holding in *Ververis v Hartfield Lanes*, ___Mich App ___; ___ NW2d ___ (2006), that a snow covered surface presents an open and obvious danger as a matter of law, leads to no different result. Here, plaintiff testified that the sidewalk appeared clear, not snow-covered.

Even if the ice-covered snow was open and obvious, this Court would nevertheless be satisfied that the trial court properly denied summary disposition. As explained in *Lugo v Ameritech Corporation, Inc*, 464 Mich 512, 517-518; 629 NW2d 384 (2001), where special aspects of a condition could be found, the special aspects provide exceptions to the generally accepted theory that a landowner has no duty to protect invitees from open and obvious conditions. According to *Lugo*, special aspects could be found where, for example, the danger is effectively unavoidable, or when despite the open and obviousness of the danger, there remains a likelihood of substantial injury. *Id.*

While defendant argues that plaintiff could have avoided the condition by using the back door to exit his townhome or simply walking around the hazard, plaintiff's deposition testimony suggests otherwise. Plaintiff testified that in addition to a front door, the townhome had a sliding glass door in the back. Plaintiff also testified, however, that the area outside the glass door was inaccessible in the winter as it was unkempt and not conducive to safe winter walking. Plaintiff additionally testified that the whole sidewalk was ice covered, indicating that walking around the hazard was not necessarily possible.

Defendant also suggests plaintiff could have walked his dog at another time. It would be expected, though, that plaintiff would have to walk his dog at some point during the evening/night and there is no evidence the condition of the sidewalk would have improved at some specific later hour. As a result, the trial court did not err in concluding the existence of questions of material fact concerning whether the condition presented special aspects (i.e. was effectively unavoidable) precluded summary disposition in defendant's favor.

As its remaining allegations of error, defendant contends there are no genuine issues of material fact regarding plaintiff's statutory theories of liability. Plaintiff allegations of statutory liability are premised upon MCL 125.536 and MCL 554.139. MCL 125.536 provides, in relevant part:

> (1) When the owner of a dwelling regulated by this act permits unsafe, unsanitary or unhealthful conditions to exist unabated in any portion of the dwelling, whether a portion designated for the exclusive use and occupation of residents or a part of the common areas, where such condition exists in violation of this act, any occupant, after notice to the owner and a failure thereafter to make the necessary corrections, shall have an action against the owner for such damages he has actually suffered as a consequence of the condition. . .

Defendant contends it had no notice of the ice on the sidewalk and did not allow the condition to remain unabated, such that it cannot be liable under MCL 125.536.

One of plaintiff's former next-door neighbors testified that defendant's maintenance people did not shovel or salt the sidewalk areas in front of their townhomes and that she complained many times to defendant's management about the salt and snow problems. Another former neighbor testified that on the date plaintiff fell, or perhaps the day after, she had complained to management about snow that had drifted onto and covered her porch and steps. The neighbor testified that the sidewalk directly in front of her townhome had not been maintained that morning and that a glaze of ice covered the

snow, causing treacherous conditions. Both neighbors further indicated that water from the gutters on the townhomes would spill onto the sidewalk in front of plaintiff's garage, making the area particularly icy.

Additionally, there is no record or evidence of preventative measures taken with respect to snow or icy conditions between January 3, 2003 and January 10, 2003 at the townhomes despite the fact that climatological data from the National Weather Service for the Lansing area indicates that at least one inch of snow fell between those dates, and that temperatures fluctuated between 3° F and 46° F in the days surrounding plaintiff's fall.

Keeping in mind that this Court is liberal in finding a genuine issue of material fact (See, e.g., *Trentadue v Buckler Automatic Lawn Sprinkler Co,* 266 Mich App 297, 306; 701 NW2d 756 (2005)), we conclude that plaintiff established a genuine issue of material fact regarding whether defendant had notice of the ice on the sidewalk or allowed the condition (or the allegedly faulty gutters argued to have contributed to the condition) to remain unabated, such that it could be found to have breached its duties under MCL 125.536. As a result, the trial court properly denied summary disposition.

Summary disposition was similarly inappropriate with respect to plaintiff's claims based upon MCL 554.139. That statute provides, in part:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
> (a) That the premises and all common areas are fit for the use intended by the parties.
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants wilful or irresponsible conduct or lack of conduct.

In the recent decision of *Benton v Dart Properties, Inc*, ___ Mich App ___; ___ NW2d ___ (2006), this Court held that the open and obvious doctrine cannot bar a claim against a landlord for violation of the statutory duty to maintain the interior sidewalks in a condition fit for the use intended under MCL 554.139. In so holding, this Court also noted, " . . . a landlord has a duty to take reasonable measures to ensure that the sidewalks are fit for their intended use. Because the intended use of a sidewalk is to walk on it, a sidewalk covered with ice is not fit for this purpose." Given the above, defendant's assertion that the existence of ice and snow on the sidewalk could not serve to trigger application of MCL 554.139 is without merit.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto